(3) (3)

Nos. 87-710, 87-735

Court, U.S.
FILED
FEB 16 1988
CLERK

In the Supreme Court of the United States
October Term, 1987

CATHERINE O. SWAN, et al.,
Petitioners,

v.

ALAN MILES RUBEN, et al.,
Respondents

WARREN CITY SCHOOL DISTRICT BOARD OF EDUCATION, et al.

v.

ALAN MILES RUBEN, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

RESPONDENT RUBEN'S BRIEF IN OPPOSITION

Alan Miles Ruben,
Counsel of Record
Stephen W. Gard
c/o Cleveland-Marshall
College of Law
Cleveland State University
Cleveland, Ohio 44115
(216) 687-2310
Counsel for Respondent Ruben
February 15, 1988

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether the reversal of a trial judge's award of attorney fees to counsel for defendants against an "additional," second chair, attorney for the unsuccessful plaintiff in a Title VII action, on the ground of abuse of discretion, presents an important question worthy of review when the error allegedly committed by the Court of Appeals involves only an asserted factual misapplication of 28 U.S.C. §1927 and this Court's Roadway Express standard?

2. Whether the individual Board of Education member Petitioners, who were sued only in their official, representative capacities, have independent standing to seek review?

3. Whether the Court of Appeals made an appropriate factual application of the "bad faith" standard for an award of

attorney fees set forth in this Court's Roadway Express decision?

4. Whether the Court of Appeals made an appropriate factual application of standards set forth in 28 U.S.C. §1927 for the award of counsel fees and costs and remanded the case to the District Court for specific findings as to any alleged acts of misconduct and any excess fees and costs incurred as a result?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

BRIEF IN OPPOSITION FOR RESPONDENT RUBEN

Respondent Alan Miles Ruben respectfully requests that this Court deny the petitions for writs of certiorari filed by petitioners Warren City School District Board of Education, et al., and Catherine O. Swan, et al., to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

COUNTER-STATEMENT OF THE CASE

This case does not present any issue, constitutional or otherwise, deserving review. Instead, it involves a mere factual question, peculiar to the protracted litigation herein, whether the trial judge abused his discretion in awarding attorney fees to counsel for defendants against an "additional", second chair, attorney for the plaintiff in a Title VII action.

The Title VII plaintiff, Jeanne Rathbun, is a female naturalized citizen of the United States who was employed by petitioner Warren City School District Board of Education as a janitor. During her employment she was victimized by two violent attacks, one sexual in nature, and "derogatory language . . . based on her sex and national origin that she made

known to her superiors and the school board." (App. 16).* Both courts below concluded that plaintiff's "superiors considered certain work that she was capable of doing 'man's work.'" (App. 16,66). In addition, Plaintiff Rathbun alleged that she was denied equal overtime opportunities and subjected to disparate workloads and a retaliatory transfer.

Plaintiff Rathbun filed charges of discrimination with the Ohio Civil Rights Commission ("OCRC") in September 1978 and the Equal Employment Opportunity Commission ("EEOC") in October 1978. In March 1979, the OCRC, on the basis of Findings of Fact, a four-page Summary of the

---

*References to "App." are to the identical appendices to the petitions for writs of certiorari filed herein.

Evidence, and a voluminous Index of Attachments which included witness statements from many of Rathbun's co-workers, found probable cause that the Warren City School District Board of Education had engaged in unlawful discrimination. (App.3).

On October 16, 1980, attorneys Shenyey, Berman and Abakumov timely filed a Title VII Complaint on behalf of Plaintiff Rathbun in the United States District Court for the Northern District of Ohio. (App.3). Insofar as is relevant here, plaintiff named as defendants Warren City School District Board of Education (hereinafter "Board of Education)" and the members of the Board of Education, Catherine O. Swan, et al.,

(hereinafter "Board Members")[1], who were sued only in their official representative capacities. (App. 16n.6).

In 1981 Shenyey, Berman and Abakumov withdrew as counsel for plaintiff for reasons unrelated to the merits of the case. (App.4). Attorney Elliott Lester then entered his appearance as counsel for plaintiff Rathbun. Several months later, respondent Alan Miles Ruben entered his appearance as "additional counsel." (App.4).

Prior to the commencement of the trial two motions to dismiss and two motions for summary judgment were filed

---

1. Employees of the Board of Education were also named as defendants, but neither the District Court or the Court of Appeals attached significance to this fact and neither petition for a writ of certiorari paid any attention to it.

by defendants in the case and denied.[2] (App.22-23). After four days of trial, the district judge dismissed the action pursuant to Rule 41(b) of the Federal Rules of Civil Procedure on June 29, 1984. Findings of fact and conclusions of law, which contained no suggestion that plaintiff's action was frivolous or instituted or prosecuted in bad faith, were filed on July 6, 1984. (App.4,n.2). The Order of Dismissal was filed July 10, 1984.

A motion for attorney fees was filed by the Board Members, who had been sued only in their representative capacities, on October 30, 1984. The Board of

---

2. A motion for summary judgment was granted as to employee defendants Pegues and Berarducci, but this is not relevant herein for the reasons noted by the Court of Appeals. (App.23,n.8).

Education filed its motion for attorney fees on January 9, 1985. On October 22, 1985 the district judge entered an Order and Opinion granting both defendants' motions in their entirety (App.5), despite the fact that no affidavit to support its fee request was ever filed by counsel for the Board of Education (App. 29,n.15). The Court ordered Respondent Ruben to pay each petitioner $2,500.00 in attorney fees (App.5).[3] The order of the district judge "does not clearly delineate the legal grounds for sanctioning Ruben". (App.5).

---

3. No fees were sought or ordered against attorneys Shenyey, Berman and Abakumov, who originally represented Plaintiff Rathbun. Attorney Lester was sanctioned in the amount of $5,000.00 and Attorney Weiner in the amount of $500.00. Plaintiff Rathbun was ordered to pay $36,159.21 in defense fees (App.5-6).

What is clear, however, is that the district judge awarded the petitioners all their legal fees from the very inception of the action and long before respondent Ruben entered his limited appearance in the case. (App.29n.15,57).

The United States Court of Appeals for the Sixth Circuit reversed and remanded (App.30). Since Ruben was not counsel in the case until long after it was filed, the Court of Appeals reached the obvious conclusion that the district judge abused his discretion by awarding fees, under 28 USC §1927 or the court's inherent power, for wrongfully instituting the lawsuit (App.21). As to any alleged misconduct in the prosectuion of the lawsuit the Court of Appeals remanded the case to the district judge to "require defendants' attorneys to

amend their motions to identify the claimed misconduct by Ruben and the extra efforts required by them as a result." (App.30). The Court of Appeals explicitly left open the possibility that the district judge could impose sanctions against Ruben pursuant to the court's inherent power or 28 USC §1927.

REASONS FOR DENYING THE WRIT

I. PETITIONERS SWAN, ET AL., WHO WERE SUED ONLY IN THEIR OFFICIAL CAPACITIES, HAVE NO STANDING TO PURSUE THIS LITIGATION.

In Bender v. Williamsport Area District, __U.S.__, 106 S.Ct. 1326, 1332 (1986), this Court held:

> [A] Member of the School Board sued in his official capacity... has no personal stake in the outcome of the litigation and therefore did not have standing to file the notice of appeal.

In this case the Board Member petitioners were sued only in their official representative capacities as members of the petitioner Board of Education (App.4, 16,n.6). Thus, the lawsuit in reality was "not a suit against the official[s] personally, for the real party in interest is the entity." Kentucky v. Graham, 473 U.S. 159, 167,n.14, (1985), (emphasis in original). See also

Monell v. New York City Dept. of Social Services, 436 U.S. 658,690 n.55 (1978). Thus, the clearly erroneous award of attorney fees to the Board Member petitioners in their individual capacities by the district court (App.16, n.6) was void for want of jurisdiction and the Board Member petitioners lack standing in their individual capacities to pursue the instant petition.

II. THE COURT BELOW PROPERLY APPLIED THE "BAD FAITH" STANDARD ADOPTED IN ROADWAY EXPRESS, INC. vs. PIPER.

In Roadway Express, Inc. v. Piper, 447 U.S. 752,767 (1980), this Court held that a trial court must make "a specific finding as to whether counsel's conduct in [the] case constituted or was tantamount to bad faith, a finding that would have to precede any sanction under the court's inherent powers." (footnotes & citations omitted).

The United States Court of Appeals for the Sixth Circuit correctly stated the legal test mandated by Roadway Express (App.10). Indeed, the sole complaint of petitioners is that the Court of Appeals allegedly misapplied the Roadway Express standard. There is no basis for petitioners' position.

The trial court was clearly erroneous in sanctioning respondent Ruben for bad faith in instituting the lawsuit when he was not counsel until over a year after the Complaint was filed. (App.21). It was also an abuse of discretion for the district court to find that respondent Ruben entered the action in bad faith. As the Court of Appeals noted "no evidence clearly contradicted [his] client's statements at the time [he] undertook representation" and, indeed, "Rathbun's statements were corroborated by the OCRC's finding that other evidence supported a discrimination action." (App.21).

The Court of Appeals recognized that Roadway Express permits sanctions for "bad faith" misconduct in the course of the litigation by an attorney but found

that in the present case "the basis for the district Judge's sanction against Ruben is not clearly delineated" (App.27) and then remanded the case to the district court for further proceedings in this issue (App.30). Clearly, this was proper and consistent with Roadway Express.

Petitioner's more specific allegations of error are spurious. The Board Member petitioners assert that no OCRC "probable cause" finding was made as to them. In fact, they were sued only in their representative capacities and the suit was in reality only against the petitioner Board of Education (App.4,16, n.6). Kentucky v. Graham, supra. Thus, the OCRC "probable cause" finding was binding on the Board Member defendants in their official capacity, the only

capacity in which they were parties to the lawsuit.

The Board Member petitioners also claim that the Court of Appeals erroneously required a warning to counsel prior to the imposition of sanctions. Although the Court of Appeals suggested warnings as good practice (App.28), no such requirement was imposed and, indeed, the case was remanded to the district court for further proceedings even though no warnings were ever given to respondent Ruben. (App.30.)

This was not a case where there was no evidence of illegal discrimination by the petitioners. The Court of Appeals correctly applied Roadway Express when it remanded the case to the district court for specific findings of "bad faith" misconduct by respondent Ruben.

III. THE COURT BELOW PROPERLY APPLIED 28 USC §1927 AND REMANDED THE CASE TO THE DISTRICT COURT FOR SPECIFIC FINDINGS.

28 U.S.C. §1927 provides:

> "Counsel's liability for excessive costs. Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney fees reasonably incurred because of such conduct."

The Court of Appeals made an obviously correct decision when it remanded the case and required the petitioners to "identify the alleged acts of misconduct by Ruben and the extra efforts required by [counsel for petitioners] as a result." (App.30) First, 28 U.S.C. §1927 explicitly applies

only where attorney misconduct "multiplies the proceedings." Second, the very terms of §1927 and its legislative history clearly provide that an errant attorney may only be sanctioned to the extent of the "excess costs, expenses, and attorneys' fees reasonably incurred because of such [dilatory] conduct." See H.R. Rep. No. 1234, 96th Cong., 2d Sess. 8, reprinted in 1980 U.S. Code Con. & Ad. News 2716,2781,2782. See also Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987).

In this case the district court abused its discretion, as the Court of Appeals held, by awarding petitioners all their legal fees from the very inception of the lawsuit and long before respondent Ruben entered his appearance in the case (App. 29 n.15,57). The district court violated both of the explicit statutory

commands of §1927 by failing to identify any specific multiplication of the proceedings and failing to identify any "excess" costs or attorney fees incurred by the petitioners. It would be a waste of this Court's precious and limited judicial resources to reaffirm the express statutory language of 28 U.S.C. §1927. This is especially true where, as in this case, petitioners have been unable to identify a single lower court decision conflicting with the Court of Appeals decision herein on these two explicit statutory requirements of §1927.

Unable to identify any conflict between the circuits relevant to the central questions in this case, petitioners instead focus on the ancilliary issue of "whether negligence as opposed to the intentional misconduct

will support a sanction under 28 U.S.C. §1927." Petition of Catherine O. Swan, et al., at 25; See also, Petition of Warren City School District Board of Education, et al., at 11-13. The vast majority of circuits which have addressed this issue have reached the same result as the Sixth Circuit below and have utilized an objective test requiring that the attorney's conduct be without plausible legal or factual foundation. See, e.g., Ford v. Temple Hospital, 790 F.2d 342 (3d Cir. 1986); Lewis v. Brown & Root, Inc., 711 F.2d 1287 (5th Cir. 1983), aff'd in part on reconsideration, 722 F.2d 209 (5th Cir.1984), cert. denied,

467 U.S. 1231(1984); Jones v. Continental Corp., 789 F.2d 1225 (6th Cir. 1986); Indianapolis Colts v. Mayor & City Council, 775 F.2d 177,182(7th Cir.

1985), quoting Knorr Brake Co. v. Harbil, Inc., 738 F.2d 223 (7th Cir. 1984) Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); Estates of Blas v. Winkler 792 F.2d 858 (9th Cir. 1986).

Westinghouse Electric Corp. v. NLRB, 809 F2d 419 (7th Cir. 1987) is the only case which has suggested that §1927 sanctions might be based on mere negligence but, in fact, the Seventh Circuit has long adhered to the majority rule and the negligence language in that case was mere dicta. The sanctions in fact were imposed based on the court's findings that "counsel tried to evade both the appellate rules and our order." Id. at 425.

It is dubious that the conflict between the circuits alleged by petitioners actually exists. More

importantly, this case is not worthy of review because this conflict can only be reached if this Court were first to hold that the Court of Appeals erred in adhering to the two express statutory requirements that there be some multiplication of the proceedings and that some excess attorney fees be incurred as a result.

CONCLUSION

Respondent respectfully submits that this case presents no issue worthy of review by this Court and thus the petitions for writs of certiorari ought to be denied.

Respectfully submitted,

STEPHEN W. GARD,
ALAN MILES RUBEN, Counsel of Record
c/o Cleveland-Marshall College of Law
Cleveland State University
Cleveland, OH 44115
(216) 687-2310
Counsel for Respondent Ruben